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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

HELEN BATTLES JACKSON, Plaintiff and Appellant, v. PAUL ANDERSON et al., Defendants and Respondents.	B182619 (Los Angeles County Super. Ct. No. TC016404)

APPEAL from a judgment of the Superior Court of Los Angeles County, William Barry, Judge. Affirmed.

Law Office of Donald A. Brooks and Donald A. Brooks for Plaintiff and Appellant.

Law Offices of James A. Rainboldt and James A. Rainboldt for Defendants and Respondents.

A year before he died, Amos Jackson (decedent) transferred several parcels of real property from his trust to defendants Paul Anderson, Loretta Anderson, and Lana Nichols (defendants). After decedent's death, his wife, plaintiff Helen Battles Jackson (plaintiff), brought the present action to void the transfers, asserting that decedent was not competent to make them and that title was not transferred in the manner required by the trust. The trial court granted a nonsuit on the issue of decedent's competence; it subsequently denied plaintiff's motion for a directed verdict on the question of the method of transfer. Plaintiff appeals from the resulting judgment, and we affirm.

FACTS AND PROCEDURAL HISTORY

On October 13, 2001, decedent transferred six parcels of real property (the properties) from the Amos Jackson Revocable Living Trust (the trust), of which decedent was settlor and trustee, to defendants through two deeds of gift. Decedent died the next year, on October 23, 2002.

Plaintiff became trustee of the trust upon decedent's death. In that capacity, she filed the present action to quiet title to the properties on October 29, 2002.[1] Plaintiff claims that decedent was incompetent when he transferred the properties to defendants (Prob. Code, § 811); she further claims that the transfers are void because they were signed by decedent in his individual capacity, not as trustee, and because they were not properly delivered.

The case was tried December 6-10, 2004. After plaintiff rested, defendants moved for a nonsuit, contending that there was no evidence that decedent was incompetent when he signed the deeds. Plaintiff opposed the motion, arguing that there was evidence that by late 2001 decedent "was in and out. He didn't have memory recall. He would forget things that he would have done. He forgot names of people that would be caring for him."

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[1] Plaintiff dismissed a second cause of action for elder abuse on May 11, 2004.

The trial court agreed that there was evidence that in 2001 decedent was incompetent some of the time, but said that "everybody who testified so far said that he had periods when he was lucid" and asked counsel what evidence he had that decedent was not competent when he signed the deeds. Counsel said that plaintiff and others had testified to decedent's incompetence; further, he said that if the court considered that testimony insufficient, he would recall plaintiff "to testify she was with him that morning [of the transfer], she was with him that night to testify what she believed his mental capacity to be as a lay person."

The court denied the request to recall plaintiff and granted a nonsuit. It explained that "everyone testified that in the 2001 time period there were periods when Pastor Jackson was very lucid in context of conducting his ministry and his daily activities." Thus, plaintiff had to show that decedent was incompetent when he signed the deeds. The court concluded that plaintiff had not and could not do so because, by her own admission, neither she nor any of her witnesses were with decedent at that time. The court explained: "[T]he evidence of [decedent's] mental incapacity was generic in terms of time rather than specific on the day in question, and the day in question is the only time that makes any difference as far as I'm concerned. So I think plaintiff can never meet [her] burden of proof in this case. I think on the issue of Pastor Amos Jackson's mental capacity, I have to grant a nonsuit . . . ."

Plaintiff's counsel then asked again to recall plaintiff "particularly in regards to the issue that has been brought up in nonsuit because she was with him that morning. She was with him that night. She was with him every day." The court refused: "Let me be clear on this. As I said earlier, I'm assuming that's absolutely true. In rendering my ruling, I assume that she was there that morning, and I assume that she was there that night. The question that I considered was whether or not this gentleman was lucid and understood what he was doing *at the time he signed the deeds*, and on that issue there's no reason to allow her to testify again because she wasn't there. So your request to reopen will be denied." (Italics added.)

Later, plaintiff's counsel asked to make an offer of proof in regards to the nonsuit. After detailing the requirements of Probate Code section 811, counsel said: "[I]t is the plaintiff's request again to have allowed to have been rehabilitated on the issue to more clearly and precisely address the date in question that she was with plaintiff, that she was with the decedent Amos Jackson in the morning, at night, not only on the day in question but the days before and the days subsequent. To the extent she was not allowed to be rehabilitated on those issues is another ground that I would like the Court to be made aware of and to be a part of the record in this matter."

Plaintiff then made a motion for a directed verdict, contending that the deeds were void because they did not comply with the formalities the trust instrument required. The court denied the motion. It later concluded that the deeds were valid and effective when executed on October 13, 2001.

The court entered judgment on February 7, 2005, and defendants served notice of entry of judgment on March 3, 2005. The court denied plaintiff's motion for new trial March 29, 2005. Plaintiff timely appealed from the judgment on April 1, 2005.

DISCUSSION

I

The Plaintiff Provided an Inadequate Record on Appeal

On appeal, plaintiff contends: (1) the trial court erred in granting a nonsuit; (2) the trial court abused its discretion by refusing to allow her to reopen her case to cure the deficiencies identified by the nonsuit motion; and (3) the trial court erred in denying her motion for directed verdict.

We need not address these claims on the merits. Plaintiff designated only the last two days (December 9–10, 2004) of this five-day trial for inclusion in the reporter's

transcript.[2] Her appeal thus is governed by California Rules of Court, rule 4(a)(5), which provides that when an appellant elects to designate only a partial reporter's transcript, the notice of appeal "must state the points to be raised on appeal; the appeal is then limited to those points unless, on motion, the reviewing court permits otherwise." (See also *McDaniel v. Dowell* (1962) 210 Cal.App.2d 26, 30; *Price v. Tree Topper Timber Co*. (1962) 202 Cal.App.2d 412, 414-415.)

Neither plaintiff's notice of appeal nor her record designation adequately identifies the appellate issues. For example, her present claim that the trial court erred by denying her motion to reopen is not mentioned. Moreover, although plaintiff was aware at least by the time she filed her appellant's opening brief that she had designated an incomplete reporter's transcript, she did not seek the Court's permission to augment the record or to raise appellate issues not identified in her notice of appeal. Thus, plaintiff waived any contention of error on appeal. (Cal. Rules of Court, rule 4(a)(5).) Nevertheless, we will reach the merits of plaintiff's claims to the extent permitted by the limited record before us.

II

.The Trial Court Did Not Err in Granting Defendant's Motion for Nonsuit

Plaintiff contends that the trial court erred in granting a nonsuit because there was evidence from which a reasonable jury could have concluded that decedent was incompetent when he transferred the property to defendants on October 13, 2001. On the present record, we cannot agree.

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[2] Plaintiff claims to have designated the complete reporter's transcript, and she asserts that despite her counsel's "repeated demands" the court reporter "failed to provide Reporter's Transcript of first two days of Trial for December 6-8, which Transcript encompasses appellant, Helen Battles Jackson's primary case in chief." We have reviewed plaintiff's Notice Designating Record on Appeal, filed May 19, 2005, and her Amended Notice to Reporters/Monitors to Prepare Transcript on Appeal, filed July 26, 2005; neither designates the oral proceedings of December 6, 7, or 8, 2004.

"'A trial court may grant a nonsuit only when, disregarding conflicting evidence, viewing the record in the light most favorable to the plaintiff and indulging in every legitimate inference which may be drawn from the evidence, it determines there is no substantial evidence to support a judgment in the plaintiff's favor.'" (*Cossman v. DaimlerChrysler Corp*. (2003) 108 Cal.App.4th 370, 375-376, quoting *Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 27-28.) "On appeal, '[w]e are bound by the same rules as the trial court. Therefore, on this appeal we must view the evidence most favorably to appellants, resolving all presumptions, inferences and doubts in their favor, and uphold the judgment for respondents only if it was required as a matter of law.'" (*Ibid.*)

On the present limited record, we cannot conclude that there was substantial evidence--or, indeed, any evidence at all--of decedent's asserted incompetence. To the contrary, the only evidence we have before us is that decedent's physician never declared him incapacitated; that decedent remained trustee of the trust until his death in October 2002; and that at or near the time decedent transferred the properties to defendants in October 2001, he was still driving, shopping without assistance, and writing checks for household expenses. Neither can we consider testimony plaintiff contends was introduced at trial but is not part of the reporter's transcript, as plaintiff urges us to do. (*Uhrich v. State Farm Fire & Casualty Co*. (2003) 109 Cal.App.4th 598, 616 ["The document is not even in the record on appeal and we cannot consider it"]; *Estate of Johnston* (1967) 252 Cal.App.2d 923, 931 [invoking "well-established rule of appellate review that this court cannot consider matters which are not included in the record on appeal"]; Cal. Rules of Court, rule 14(a)(1)(C).)

Thus, because we are constrained by the limited appellate record before us, we must conclude that the trial court did not err in granting a nonsuit.

III

The Trial Court Did Not Abuse Its Discretion by Denying Plaintiff's Request to Introduce Additional Evidence After Defendants Moved for a Nonsuit

Plaintiff contends that the trial court erred in refusing to allow her to introduce additional evidence to cure the defects identified by the motion for nonsuit. Again, we disagree.

"Ordinarily when the defendant moves for nonsuit it is an abuse of discretion to deny the plaintiff's request to reopen and present additional evidence to cure the defects in its case." (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 382; see also *Charles C. Chapman Building Co. v. California Mart* (1969) 2 Cal.App.3d 846, 858 ["After a motion for nonsuit is made in a jury trial (Code Civ. Proc. § 581c), it is the trial court's duty, if so requested, to permit the plaintiff to reopen his case and introduce further evidence"].) Such an error is waived, however, unless plaintiff makes an offer of proof describing the additional evidence and explaining how it would cure the deficiencies. (*Alpert v. Villa Romano Homeowners Assn.* (2000) 81 Cal.App.4th 1320, 1337; *Consolidated World Investments, supra*, 9 Cal.App.4th at p. 382.) Moreover, "any error in refusing to allow appellant to reopen the case and present further evidence must be prejudicial to warrant reversal [citations], and appellant has the burden of establishing prejudicial error." (*Charles C. Chapman Building Co. v. California Mart, supra*, 2 Cal.App.3d at pp. 858-859; see also *Abreu v. Svenhard's Swedish Bakery* (1989) 208 Cal.App.3d 1446, 1457; *Cacciaguidi v. Elliott* (1974) 39 Cal.App.3d 261, 265-266.)

Here, plaintiff's counsel asked to recall plaintiff "to testify she was with [decedent] that morning, she was with him that night to testify what she believed his mental capacity to be as a lay person." Counsel repeated this request several times, but he never told the court what the substance of plaintiff's proposed testimony would be. Thus, plaintiff did not satisfy her burden to show "what additional evidence would be presented or how the additional evidence would cure the defects in the case." (*Consolidated World Investments, Inc.*, *supra*, 9 Cal.App.4th at p. 382 [no error in

denying request to reopen where plaintiff "made only a vague request to reopen 'to submit additional evidence that might clarify a lack of evidence submitted that would support the motion for a nonsuit'"]; *S. C. Anderson, Inc. v. Bank of America* (1994) 24 Cal.App.4th 529, 539 [no error in denying request to reopen where "it is unclear whether the information and testimony to be supplied . . . would have cured the deficiencies in (plaintiff's) proof"]; cf. *In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1124 ["The offer of proof must be specific, setting forth the actual evidence to be produced, not merely the facts or issues to be addressed and argued"].)

Moreover, even if plaintiff's offer of proof had been sufficient to tell the trial court *what* plaintiff intended to testify to, on the present record we still could not conclude that the proffered testimony was relevant or that its exclusion was prejudicial. Legal capacity is presumed to exist (Prob. Code, § 810), and it must be determined *as of the time decedent took the challenged action*. (*Estate of Fritschi* (1963) 60 Cal.2d 367, 372; *Estate of Fosselman* (1957) 48 Cal.2d 179, 185.) If there is evidence that a decedent suffers from a mental disorder "of a general and continuous nature," then his or her incompetence on a given day "may be proved by evidence of incompetency at times prior to and after the day in question." (*Estate of Fosselman*, *supra*, 48 Cal.2d at pp. 185-186.) However, "'[w]hen one has a mental disorder in which there are lucid periods, it is presumed that [decedent's] will has been made during a time of lucidity.'" (*Estate of Mann* (1986) 184 Cal.App.3d 593, 604, quoting *Estate of Goetz* (1967) 253 Cal.App.2d 107, 114.)

Applying these principles, courts repeatedly have held that where there is evidence that a decedent was competent some of the time, evidence that he was incompetent *at other times* will not support a judgment invalidating a testamentary document in the absence of evidence of incompetency when the document was executed. For example, in *Estate of Mann*, *supra*, 184 Cal.App.3d 593, the decedent was under a conservatorship, her physician testified that decedent suffered from senile dementia, and other witnesses testified that decedent was not eating or caring for herself properly. (*Id*. at p. 600.) Nonetheless, the Court of Appeal concluded that there was insufficient evidence to

support the jury's determination that the decedent was not competent when she executed her will: "Dr. Lee testified that decedent's mental state fluctuated . . . . Thus a finding of lack of testamentary capacity can be supported only if the presumption of execution during a lucid period is overcome. [¶] The witnesses to execution of the will all testified decedent was aware of what she was doing at the time, and that they would not have signed the will if this had not been true. [Fn. omitted.] While the jury was free to disbelieve this testimony, '[d]isbelief does not create affirmative evidence to the contrary of that which is discarded.' [Citation.] The only evidence suggestive of decedent's incapacity at the time the will was executed is in fact evidence of her condition at other times. That is, the only bases for the conclusion she lacked capacity at the time of execution would be inferences that the factors leading to the conservatorship rendered her incapable of comprehending the extent of her property *and continued* to so affect her at the time of the will's execution, and that her senility caused faulty recollection at this time." (*Id*. at p. 604.)

The court reached a similar result in *Estate of Arnold* (1940) 16 Cal.2d 573. There, a jury concluded that the decedent lacked testamentary capacity when he executed his will; the trial court granted judgment notwithstanding the verdict and entered an order admitting the purported will to probate. (*Id*. at p. 576.) The Supreme Court affirmed. Although it was undisputed that the decedent suffered from chronic alcoholism and was usually intoxicated, several witnesses testified to having observed him sober. (*Id*. at pp. 582-585.) Thus, the court concluded, since "[a]bsolutely no showing was made that the testator *at the time of executing his will* was not in the possession of sufficient mental capacity to understand the nature of his act," the trial court correctly concluded that there was no substantial evidence to support the jury's finding of incompetence. (*Id*. at pp. 588-590, italics added; see also *Estate of Casarotti* (1920) 184 Cal. 73 [reversing judgment revoking probate of will on grounds of mental incompetence; testimony that decedent was "in a state of stupor bordering on coma" several hours before and after he executed his will did not support jury's verdict of incompetency].)

These cases demonstrate that evidence of a decedent's incompetence before or after executing legal documents is relevant in some cases (i.e., where decedent is incompetent all the time), and not relevant in others (i.e., where decedent has periods of lucidity). Here, nothing in the limited appellate record before us suggests that decedent was continually incompetent around the time he signed the deeds. Rather, the record shows that at or near the time that decedent transferred the properties to defendants in October 2001, he still had periods of competence. Thus, decedent's competency at the time he signed the deeds could not have been called into question by the additional evidence that plaintiff sought to introduce, of his asserted incompetency early and later the same day.

We therefore cannot conclude that the additional evidence plaintiff sought to introduce was relevant or that its exclusion was prejudicial.

IV

The Trial Court Did Not Err by Denying Plaintiff's Motion for a Directed Verdict

Plaintiff urges finally that the trial court erred in denying her motion for directed verdict because she claims that it was undisputed that the transfer of property to defendants violated the requirements of the trust instrument. However, her brief neither identifies what trust provisions allegedly were violated nor cites *any* evidence--including the trust document itself--that would support her contention.

Plaintiff's cursory and unsupported contention that the transfers violated the trust provisions falls short of what is required to raise an issue on appeal. (See, e.g., *People v. Barnett* (1998) 17 Cal.4th 1044, 1107, fn. 37 ["As this contention is perfunctorily asserted without any analysis or argument in support, we reject it as not properly raised"]; *Levin v. Ligon* (2006) 140 Cal.App.4th 1456, 1486 ["It is not the duty of a reviewing court to search the record for evidence on a point raised by a party whose brief makes no reference to the specific pages where the evidence can be found"]; *Dabney v. Dabney* (2002) 104 Cal.App.4th 379, 384 ["We need not consider an argument for which no authority is furnished"]; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785

["When an appellant . . . asserts (a point) but fails to support it with reasoned argument and citations to authority, we treat the point as waived"].) Thus, this contention is waived.

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

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SUZUKAWA, J.

We concur:

WILLHITE, Acting P.J.

MANELLA, J.